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NEW TRIALS FOR ERRONEOUS RULINGS UPON EVIDENCE; A PRACTICAL PROBLEM FOR AMERICAN JUSTICE.

An erroneous ruling having been made and excepted to, and the excepting party having received an adverse verdict on the law and the evidence, the great question on appeal then becomes, *Shall a new trial be granted because of the erroneous admission or exclusion of the particular piece of evidence?* It is a great question, because, although it does not directly involve the tenor of the rules of evidence, yet the whole status of the law of evidence, as well as the efficiency of our methods of doing justice, is dependent upon the answer. Whether that law of evidence shall be a mere means to an end—the end being a just settlement of particular controversies—, or whether it shall be an end in itself—an end so independent of justice, and so superior thereto, that it must be attained even at the cost of justice—, this depends practically upon whether it can be conceded that an erroneous ruling of evidence is *ipso facto* a ground for a new trial.

1. *The orthodox English Rule, and the Exchequer Rule.* The original and orthodox English rule was plain. An erroneous admission or rejection of a piece of evidence was not a sufficient ground for setting aside the verdict and ordering a new trial, unless upon all the evidence it ap-

peared to the judges that the truth had thereby not been reached:

1807, *R.* v. *Ball,* R. & R., 133: "Whether the Judges on a case reserved would hold a conviction wrong on the ground that some evidence had been improperly received, when other evidence had been properly admitted that was of itself sufficient to support the conviction, the Judges seemed to think must depend on the nature of the case and the weight of the evidence. If the case were clearly made out by proper evidence, in such a way as to have no doubt of the guilt of the prisoner in the mind of any reasonable man, they thought that as there could not be a new trial in felony, such a conviction ought not to be set aside because some other evidence had been given which ought not to have been received. But if the case without such improper evidence were not clearly made out, and the improper evidence might be supposed to have had an effect on the minds of the jury, it would be otherwise."

Such was the rule in the King's Bench, in criminal[1] as well as in civil cases.[2] Such was the rule in the Common Pleas,[3] plainly stated in Doe *v.* Tyler. Such was equally the practice in Chancery,[4] when issues had been sent to a jury in a common-law court. All this lasted down to the decade of 1830.

In that decade the Court of Exchequer in Crease *v.* Bur-

[1]1781, Tinkler's Case, R. & R. 133, note (all the Judges thought the evidence of a witness of the name of Parsons ought not in strictness to have been received; but as the evidence was ample without it, "the Judges did not think themselves bound to stop the course of justice"); 1807, R. *v.* Ball, R. & R. 133 (quoted *supra*); 1809, Lord Ellenborough, C. J., in R. v. Teal, 11 East 311: ("If the evidence [as to character] had been admitted, it could have made no difference, at least it ought not to have made any difference in the verdict"); 1810, R. *v.* Treble, R. & R. 164, Heath, J. Though there could not at this period be a new trial in cases of felony, but only a pardon of the prisoner, still the general judicial tendency of those times to favor the escape from the gallows was such as to make up, in the judicial mind, for this difference between the modern law and the earlier law as affecting the balance of risks.

[2]1819, Abbott, C. J., in Tyrwhitt *v.* Wynne, 2 B. & Ald. 554, 559 (the mere erroneous ruling of rejection "will not be sufficient, for it must be further shown and substantiated that, if they had been received, they would have led to a probable conclusion in favor of the offering party.) In Edwards *v.* Evans, 3 East 451, 455 (1803) occurs a premonitory instance of the later rule.

[3]1807, Mansfield, C. J., in Horford *v.* Wilson, 1 Taunt. 12, 14 ("Neither will the Court set aside a verdict on account of the admission of evidence which ought not to have been received, provided there be sufficient without it to authorize the finding of the jury"); 1830, Doe *v.* Tyler, 6 Bing. 561 (rule explicitly approved); so too, in the Federal Supreme Court, for new trials as distinguished from writs of error: 1828, Story, J., in M'Lanahan *v.* Ins. Co., 1 Pet. 170, 183 ("In such cases, the whole evidence is examined with minute care, and the inferences which a jury might properly draw from it are adopted by the Court itself; if therefore upon the whole case justice has been done between the parties, and the verdict is substantially right, no new trial will be granted, although there may have been some mistakes committed at the trial").

[4] 1805, L. C. Eldon, in Pemberton *v.* Pemberton, 11 Ves. 50, 52 ("If upon the whole [record] he is satisfied that justice has been done, though he may think that some evidence was improperly rejected at law, he is at liberty to refuse a new trial"); 1816, Bullen *v.* Michel, 4 Dow 297, 319, 330; 1826, Barker *v.* Ray, 2 Russ. 76; 1838, L. C. Cottenham, in Lorton *v.* Kingston, 5 Cl. & F. 269, 340 ("The true consideration always is whether upon the whole there appears to be such a case as enables the judge in equity satisfactorily to administer the equities between the parties without the assistance of another trial.")

rett,[1] announced a rule which in spirit and in later interpretation signified that an error of ruling created *per se* for the excepting and defeated party a right to a new trial. The new Exchequer rule was speedily accepted in the other courts;[2] and for something more than a generation it remained the law of England, until it was reformed away, for civil causes, in 1875.[3]

The Exchequer rule duly obtained recognition in the United States in a majority of jurisdictions. In its most extreme form, and in language exhibiting in the most radical manner the theory that the rules of evidence form an end in themselves, the new doctrine--which had indeed given sporadic signs of independent growth—was now rapidly promulgated.[4] During the last generation, the Exchequer heresy has clearly gained the ascendance.

[1] 1835, Crease *v.* Barrett, 1 C. M. & R. 919, 932 (intimating that the only cases where the error would be ineffective were where the same fact was otherwise proved or not disputed and where a verdict in favor of the defeated party "would have been clearly and manifestly against the weight of evidence and certainly set aside upon application to the Court as an improper verdict"); 1846, Hughes *v.* Hughes, 15 M. & W. 701 (Alderson, B., declared the rule to be that "the Court will not grant a new trial if with the evidence rejected a verdict given for the party offering it would be clearly against the weight of evidence, or if without the evidence received there be enough to warrant the verdict"; confusing two different tests, and citing Doe *v.* Tyler and Crease *v.* Barrett without discrimination); 1847, Doe *v.* Langfield, 16 *id.* 497, 515 (approving Crease *v.* Barrett, Parke, B., applies the exception there stated, and here refuses a new trial since "no evidence was improperly rejected but such as was immaterial and if admitted would not have prevented a nonsuit.")

[2] 1835, Rutzen *v.* Farr, 4 A. & E. 53 (the Exchequer rule in Crease *v.* Barrett followed, and the Common Pleas rule in Doe *v.* Tyler rejected); 1837, Wright *v.* Tatham, 7 A. & E. 313, 330 (Denman, C. J. "As this Court has so lately, on full consideration, and in conformity with a decision of the Court of Exchequer, renounced the discretion which was in that case [of Doe *v.* Tyler] exercised, we need not repeat our reasons for holding that * * * the losing party has a right to a new trial"); 1887, Coleridge, C J., in R. *v.* Gibson, L. R. 18 Q. B. D. 537, 540 ("Until the passing of the Judicature Acts, the rule was that if any bit of evidence not legally admissible, which might have affected the verdict, had gone to the jury, the party against whom it was given was entitled to a new trial.")

[3] 1875, Judicature Act, 1883, Rules of the Supreme Court, Order 39, rule 6 ("A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence * * * unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned on the trial"); 1893, Pearce *v.* Lansdowne, 69 L. T. Rep. 316. The reform had originally been introduced by Mr. (later Sir) James F. Stephen: 1872, Indian Evidence Act (Stephen's ed.), § 167 ("The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.")

[4] 1895, Miller, J., in State *v.* Callahan, 47 La. An. 497: ("The admission of illegal evidence in a civil case is comparatively unimportant. * * * But in a criminal case * * * it is for the jury to convict, and it is presumed to act on all the evidence submitted. * * * It is the right of the accused to be tried on legal evidence alone. * * * The conviction must be by legal evidence only"); 1808, Sewall, J., in Bartlet *v.* Delprat, 4 Mass. 708: ("And upon the whole, although the other facts appearing in this case leave very little doubt of the justice of the verdict, yet as the competency of the evidence excepted to is not supported by any of the authorities we have examined, we think the verdict must be set aside"); 1894, Com. *v.*

There are, to be sure, Courts that still cling to the old-fashioned notion, resting on the orthodoxy of Doe *v.* Tyler, and refusing to bow the knee to the Baal-worship of the rules of evidence.[1] A model example of such an opinion is the following:

1866, Porter, J., in People *v.* Fernandez, 35 N. Y. 49, 59: "The circumstances which were established by evidence, confessedly competent, were so conclusive as to the guilt of the prisoner that no honest jury could refuse to convict him of the crime. To acquit him would be to shield guilt from justice and deny the protection of law to the innocent. If, therefore, the Court below was right in holding that the judge erred in admitting additional evidence tending to the same conclusion, we think it was clearly wrong in reversing the conviction; for, upon the facts disclosed, the supposed error could work no legal injury to the prisoner. As it was shown, beyond all question, by undisputed and competent proof, that the accused was one of the murderers, we are under no legal or moral obligation to assume that the jury might have rendered a false verdict of acquittal but for the erroneous admission of other and needless evidence. In this respect, there is no distinction between civil and criminal cases. The reception of illegal evidence is presumptively injurious to the party objecting to its admission; but where the presumption is repelled, and it clearly appears, on examination of the whole record, beyond the possibility of rational doubt, that the result would have been the same, if the objectionable proof had been rejected, the error furnishes no ground for reversal."

2. *Reason and Practical Working of the Exchequer Rule.* What can be said on behalf of the Exchequer rule? The theories advanced to support it have been chiefly two. The first is the theory that a party has a legal right to the

White, 162 Mass. 403, 38 N. E. 707; 1886, Cobb, J., in Masters *v.* Marsh, 19 Neb. 467 (excluding certain books of account: "While I do not think that the books would have proved any fact of the least value in the case had they been properly admitted, yet the party presenting them would scarcely be permitted to escape the consequence of an erroneous ruling on that ground"); 1874, Cole, J., in Schaser *v.* State, 36 Wis. 434: ("It may be shown by the most irrefragable proof that the deft. is guilty of the offense charged against him; but this does not justify the violation of well settled rules of evidence in order to secure his conviction)." So, too, the words of Mr. Justice Story have been forgotten in the Court which he distinguished: 1894, Waldron *v.* Waldron, 156 U. S., 380, 15 Sup. 383; 1898, Northern P. R. Co. *v.* Hayes, C. C. A., 87 Fed. 131 ("It is elementary that the admission of illegal evidence over objection necessitates a reversal").

[1] 1885, State *v.* Beaudet, 53 Conn. 536, 539 (if evidence excluded "could not properly have changed the result, then he was not aggrieved by the ruling"); 1846, McCleskey *v.* Leadbetter, 1 Ga. 551, 556 ("The Courts will not set aside a verdict on account of the admission of evidence which ought to have been rejected, provided there be sufficient without it to authorize the finding"); 1896, Gardner *v* R. Co., 135 Mo. 90, 36 S. W. 214 ("The judgment was manifestly for the right party; and where such is the case, the judgment will not be reversed because some incompetent testimony was admitted"); 1839, State *v* Ford, 3 Strobh. 528 (Earle, J., dissents as to the propriety of admitting certain evidence, but agrees to dismiss the motion for a new trial; for "in such a case as this, where the prisoner's guilt is very manifest * * *, I think it would exhibit unnecessary squeamishness to say he has not been legally convicted on abundant evidence").

judicial observance of the rules of evidence *per se*. The second is the theory that the judicial consideration of the weight of all the evidence, as a motive for refusing a new trial, would be a usurpation of the jury's function. The whole doctrine, no doubt, has its deepest roots in the inveterate and unconscious professional instinct, which grows to venerate unduly the rules that form its daily mental pabulum. But there must at least be some ostensible reason; and these two have served in that capacity:

1835, Parke, B., in Crease *v.* Barrett, 1 C. M. & R. 919, 932: "The rule is there laid down [in the Common Pleas] much too generally; and it is obvious that if it were acted upon to that extent, the Court would in a degree assume the province of the jury; and besides, its frequent application would cause the rules of evidence to be less carefully considered."

1838, Morton, J., in Ellis *v.* Short, 21 Pick. 142, 144; "Some of the evidence objected to was not only clearly irrelevant, but might have prejudiced the jury against the plaintiff. We therefore find ourselves constrained to grant a new trial. We regret that we find it necessary to do this; because the action involves no principle of law, is attended with an expense disproportionate to its importance, has been fully and elaborately tried, and been brought to a result, which was entirely satisfactory and which there is very little reason to suppose will be changed on another trial, by the exclusion of the evidence which was improperly admitted. The English Courts and those of some of our sister States exercise a much broader discretion in relation to the granting of new trials than we do. Their practice is to refuse new trials for the improper admission or rejection of evidence, whenever, in their opinion, such erroneous admission or rejection of evidence, whether material or immaterial, ought not to have affected the verdict, or substantial justice has been done. This seems to us to trench upon the province of the jury. How can the Court know how much influence each particular piece of evidence had upon the minds of the jury, or that the illegal evidence was not the weight, however small it may be, which turned the balance, and that without it the opposite scale would not have preponderated? To sustain a verdict, under such circumstances, may be to make a decision contrary to the convictions which the legal evidence would have produced upon the minds of the jury. * * It is the province of the Court to guard the decisions of the jury from the influence of foreign or irrelevant matter and preconceived opinions and prejudices; and this imposes upon it the duty, on proper occasions, of giving to the jury an opportunity to revise its decisions; but never authorizes it to weigh the evidence or to determine how they should ultimately decide upon matters of fact."

1875, Devine, J., in Pigg *v.* State, 43 Tex. 112: "The refusal of the Court to permit the witness to answer the question [an opinion as to insanity] deprived the accused of a clear legal right. How far his defense may have been prejudiced by it, we cannot say. It is sufficient to know

that it was his right to have the question answered by the witness, and that it was relied on as material to his defense."

As to this theory of *legal right*, it may be said in reply that no man has a legal right to have his cause wrongly decided,—for that is what this "right" comes to. He has indeed a legal right to a jury trial; and he has a right to a fair trial in general. But these are ends in themselves, because the one by constitution and the other by common sense of justice becomes a paramount object. But none can justify the exaltation of the ordinary rules of evidence, which are mere instruments of investigation, into an end in themselves. As well might a gardener cut down a thriving vine because his henchman has used a hoe instead of a spade in planting it; or a farmer bring valuable bantams to the block because they were hatched by a meddlesome duck instead of by their lawful parent. A glance at common affairs will awaken us to the intrinsic absurdity of the theory of "legal right." As for the theory of *usurpation*, it ignores the doctrine and the history of the jury's function. It has always been under the control and correction of the trial judge and the appellate courts.[1] The judge determines questions of fact upon which the admissibility of evidence depends. The judge draws inferences of fact on a demurrer to evidence. The judge rules whether the whole evidence is sufficient to go to the jury, and whether the verdict is against the weight of evidence. He has never been without this revisory function. Moreover, upon a question of new trial, because of erroneous ruling on evidence, the appellate court is not asked to overturn the verdict; on the contrary, it is asked to let the verdict stand, and the precise question which the appellate court decides is, not whether the jury have been correct or incorrect, but whether, subtracting or adding the evidence admitted or excluded, the truth seems to be identical with the jury's verdict. This is a collateral question, and is entered upon merely as a help to avoiding, if possible, the disturbance of the verdict. The "usurpation," if any, consists in setting aside the verdict, not in confirming it. The advocates of the Exchequer rule concede that, for the purpose of overturning the verdict, they may scrutinize and inter-

[1] The history of this is to be found in Thayer, Preliminary Treatise on Evidence, 183–253.

fere with it, so as to say that it goes against the weight of the whole mass of evidence; yet, for the purpose of supporting the verdict, they profess to be unable to weigh a particular piece of evidence, so as to say that it could not have affected the same weight of evidence. This is one of the most indefensible cases of Tweedledum *v.* Tweedledee that has ever been sanctioned in our books.

As to the practical working of the Exchequer rule, the results are lamentable. Whether in civil or criminal cases, it has done more than any other one rule of law to increase the delay and expense of litigation, to encourage defiant criminality and oppression, and to foster the spirit of litigious gambling. Added to this is the indirect result produced upon the ever-lurking animal instinct of gregarious human brutality, which takes the failures of criminal justice as its pretext and sates itself with cruel lynchings. That the law has gone to the extremes of absurd and provoking technicality in applying this rule is plain enough, even in a casual glance through the reports. Some of the instances of its enforcement would seem incredible even in the justice of a tribe of African fetish-worshippers.[1] As types of what is done in a lesser way every day in every court,

[1]The following instances have been here and there noted, and could be multiplied by the score: 1896, Louisville & N. R. Co. *v.* Miller, 116 Ala. 600, 19 So. 989 (more than a dozen exceptions to rulings on evidence; one only of these being found wrong, though no substantial prejudice was asserted, a new trial was granted); 1896, Louisville & N. R. Co. *v.* Malone, *id.* 20 So. 33 (similar; here there were twenty rulings and exceptions); 1878, People *v.* Bell, 53 Cal. 119 (here the defendant's testimony that the deceased, with whose murder he was charged, was habitually profane, was erroneously allowed to be contradicted by the prosecution, and though the matter was held to have "had no reference whatever to the guilt or innocence of the defendant," a new trial was ordered, solely on this error); 1897, Murphy *v.* Backer, 67 Minn. 510, 70 N. W. 799 (new trial granted solely because of a single improper contradiction of a witness on a collateral point); 1894, Carpenter *v.* Lingenfelter, 42 Neb. 728, 60 N. W. 1022 (new trial granted for allowing the contradiction of a witness on an immaterial point); 1899, State *v.* Jefferson, 125 N. C. 712, 34 S. E. 648 (a mob had almost lynched the accused, at the time of the arrest; but a new trial was awarded on the merest quibble of evidence, while conceding that the whole evidence "warranted conviction"); 1897, Cutler *v.* Skeels, 69 Vt. 154, 37 Atl. 228 (eighteen exceptions; a new trial granted simply because the plaintiff's counsel in his address said that he knew his clients to be of good reputation and that this was the best kind of evidence for them); 1896, Carver *v.* U. S. 160 U. S. 553, 16 Sup. 388, 17 Sup. 228 (a dying declaration was sanctioned as admissible, but the deceased on a subsequent day had said to an inquirer that her former declaration "was true in every particular:" this being erroneously admitted, a new trial was granted solely because of the error; later the case was again reversed in 164 U. S., 694, 17 Sup. 228). The Federal Supreme Court has been especially callous in pushing the technical rule to extremes, notably in its treatment of some of the rulings of the late Judge Parker, of the Arkansas District, one of the greatest trial judges of the Federal bench, whose work for law and order in that region was inestimable; examples may be found in Allen *v.* U. S., tried in 1893, reversed in 150 U. S. 551, reversed again in 157 U. S. 675, finally affirmed in 1896 in 164 U. S. 492, 17 Sup. 154; in Starr *v.* U. S., reversed in 1894, in 153 U. S. 614, and again in 1897, in 164 U. S. 627, 17 Sup. 223; and in Brown *v.* U. S., reversed three times, in 150 U. S. 93, 159 U. S. 100, and 164 U. S. 221. These cases give to volume 164 of the Federal Supreme Court reports a discreditable mark in our jurisprudence.

they would explain well enough, even if there were no further reason, why poor men may hesitate to send their cause to trial,—why a rich oppressor or a desperate criminal may hope to tire out all endeavors to do justice on him,—why the decisive question for the suitor before litigation often is, not who is right, but who can longest endure,—why ignorant mobs have a patent pretext for distrusting the distant gallows and substituting a near-by tree or stake. Just so long as an erroneous ruling on evidence, however trifling, is described by the highest judges (and in many courts it habitually is) as "working a reversal," just so long will the reproach of technicality and futility mark our litigation. Until the rules of evidence cease to be assimilated to the play of a hand at whist or the operations of an automatic cash-register, they must remain, as often as not, the instruments of injustice.

Nor have there been wanting sage and courageous warnings from the Bench against the downward tendencies of the modern rule. Many judges—usually, though, as dissenters—have recorded their protests against its theory and their condemnation of its results. Their words and their example have remained thus far without avail; but the time will come when they must be heeded:

1897, Brannon, J., diss., in State *v.* Musgrave, 43 W. Va. 672, 28 S. E. 813: "If we could say there was any misstep in matter of law in this long trial, it is one of very immaterial character, weighing not a feather in the trial, utterly inadequate to justify the reversal of a long, laborious trial bearing to us the face of having been full, patient, and fair. The scope of harmless error, is in these days, widening. Courts do not nowadays, even in grave trials, reverse such trials for trivial errors, evidently not affecting them; so light, and plainly playing so unimportant a part, as not to be appreciably influential or prejudicial when the whole trial, all in all, is regarded. In days gone by, technicalities and rigid procedure sprang up and were enforced to defend accused parties against the demand of monarchic power for conviction, and they then answered, 'Good purpose;' but in this country there is not the same need of them, as the danger now is that the guilty will go free, and something is necessary to protect the public against crime. The great press is declaiming against the courts for lax administration of criminal law. The New York World recently stated that statistics show that for 10 years past only 2.20 per cent. of homicides have been punished, and that the people are afraid of the courts, and for quick justice resort to lynch law; and further says that this is attributable to the laxity and languor with which the law is enforced, the quibbles, subtleties, and technicalities of the courts fortressing

criminals, and causing the administration of justice to appear a mere mockery. Such, I observe, is now almost the universal expression of the press. I would not overturn the solemn verdicts of juries rendered after fair trials, and approved by the trial court, unless I could see that on the whole case something substantially wronging the prisoner had been done. I would therefore affirm."

1897, Haight, J., diss, in People *v.* Koerner, 154 N. Y. 355, 48 N. E. 730: "I am unwilling to join in the affirmance of a case of this character where the accused has not had the benefit of a fair and impartial trial; but, in cases where no reasonable doubt with reference to the guilt of the accused exists, I think we ought not to send a case back for errors which cannot and ought not to affect the result reached by the jury. If any public good is to be accomplished by the administration of the criminal law, punishment should follow the commission of crime with reasonable dispatch. The Legislature has given this Court broad powers with reference to the granting or refusing of new trials; and, while it is our duty to fully protect the rights of the accused and see to it that no innocent person is punished, we should not forget that there is a public interest involved, which it is also our duty to regard."

1898, Whitfield, J., diss., in Lipscomb *v.* State, 75 Miss. 559, 23 So. 210, 228. "It must thus be clear, beyond all cavil, that this appellate tribunal is not a helpless prisoner, bound in the fetters of some supposed hard and fast rule requiring it to reverse cases where,—first, erroneous instructions have been given; or, second, proper instructions have been refused; or, third, competent testimony has been excluded; or, fourth, incompetent testimony admitted; or, fifth, improper argument has been allowed; or, sixth, the trial court has erred in its rulings on the pleadings,—on the ground, merely, that such action of the Court, of the one kind or the other, constitutes error in law merely. Every one of these propositions is laid down as settled law. * * * With all deference, it seems to me that my brethren have clearly confounded the primary function of the jury to pass on the evidence and find the defendant guilty, if satisfied beyond a reasonable doubt, and the power which this appellate tribunal exercises in reviewing that finding of the jury. When the Court so reviews the finding of a jury in a criminal case, and reverses, as it repeatedly has done, on the sole ground that the evidence was manifestly insufficient to warrant the verdict of guilty, or affirm the jury's finding of guilt when that verdict is clearly right on the law applicable to the case and the competent testimony in the case, as it has also repeatedly done, this Court is not usurping the jury's primary function, and passing originally upon the guilt or innocence of the defendant, but is manifestly exercising its undoubted appellate power of reviewing and upholding or vacating the finding of the jury, as the case made may demand, in accordance with settled rules of law governing appellate jurisdiction. The practical inquiry is the true inquiry, and the practical rule must always be * * * that where substantial justice has been done, and the right result has been reached on competent testimony under the law applicable to the case, and no other

reasonable verdict could be rendered than the one which was rendered, a reversal should not follow. The administration of justice is a practical thing. It should be administered in a practical way, so as, while not denying to any defendant any substantial right to which he is entitled by the law of the land, to protect society from violators of the law, and to secure the punishment of guilty men properly convicted."[1]

3. *Future of the Exchequer Rule.* What is to be the remedy? Unfortunately, it does not seem to be merely in legislation. The fetters of the pernicious rule of the Exchequer were not forged by mere precedent, but by professional habit and tendency. They cannot be struck off by a simple statute. This has been tried; but in vain. There was already, at the very beginning, ample precedent and tradition for the better principle; yet the judges of the King's Bench and the Common Pleas and of our own Courts, when they could choose, made deliberate choice of the worse way. So, too, when legislation has sought to turn them back, they have persisted nevertheless, driven by this same strong technical instinct. In many jurisdictions there are statutes which expressly authorize and command that a new trial shall be granted only when justice requires it, and their object was to abolish the Exchequer rule. What was the consequence? In New York, for example, both the earlier statute[2] and the later statute[3] have proved alike ineffectual. In New Jersey the same fate

[1] See also a strong opinion by Wallace, J., diss., in People *v.* Stanley (1874), 47 Cal. 113, 119.

[2] N. Y. St. 1855, c. 337 (a new trial may be granted if the appellate court is satisfied "that the verdict against the prisoner was against the weight of evidence or against law, or that justice requires a new trial"); 1858, Cancemi *v.* People, 16 N. Y. 507 (new trial granted for an erroneous ruling on character-evidence, merely because it was '*calculated* to mislead the jury as to the weight which the evidence should receive"); 1873, Stokes *v.* People, 53 N. Y. 174 (the deceased's threats communicated were admitted, but some threats uncommunicated were erroneously rejected; a new trial was granted, although the admission of the excluded evidence would simply have added to the number of threats proved).

[3] Here for awhile something was achieved; and then the practice fell back into the old rut: N. Y. Code Cr. Proc § 542 (the Court shall "give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties "); 1896, Gray, J., in People *v* Hoch, 150 N. Y. 301, 44 N. E 976 ("The spirit of this legislation, as is its letter, is that if the accused has had a fair trial upon his accusation, and if this Court is satisfied that the conviction is sufficiently supported by competent evidence, that conviction shall stand"); 1897, People *v.* Conroy, 153 N. Y. 185, 47 N. E. 258 (preceding case approved); 1897, People *v.* Burgess, 153 N Y. 561, 47 N. E. 889 (same): 1897, People *v.* Strait, 148 N. Y. 566, 47 N. E. 1090 ("That statute [C. Cr. P. § 542] is but little more than a codification of the previously established rule * * *; neither that rule nor the statute affects the well-established principle that the rejection of competent and material evidence, which is harmful to the defendant and excepted to, presents an error requiring a reversal. Such a ruling affects a 'substantial right,' even though the appellate court, with the rejected evidence before it, would still come to the same conclusion reached by the jury; the defendant has the right to insist that material and legal evidence offered by him shall be received and submitted to the jury").

ensued[1]. Occasionally, indeed, the true spirit has been communicated,—as in Kentucky.[2] But on the whole the effort has been fruitless. By an emasculating interpretation, or by a virtual obliteration, the statutes remain substantially null. Professional instinct from within, and professional pressure from without—the demands of the bar to be allowed to win by technicalities—, have been too strong.

But the thing can be done. It *has* been done. In England, to-day, the whole odious practice of misusing the rules of evidence as petty stratagems in litigious tactics has passed away. In the reports of decisions, there now occur annually not more than five rulings upon points of evidence, as against more than five hundred in the reports of the United States,—and that in a community almost half as populous as ours but more than twice as litigious. The reformatory legislation in England, commencing with the Common Law Procedure Act of 1852 and culminating in the Judicature Act of 1875 and the Rules of Court of 1883, seems to have been based upon a profound professional revolution, and to have signified not merely a change of rules but a change of spirit. The same thing is possible among us. No doubt the contributing conditions to such a change must be numerous. But

[1] N. J. St. 1894, May 9, c. 163 (new trial is to be granted where any "manifest wrong or injury" has been suffered); 1897, Kohl *v.* State, 59 N. J. L. 445, 37 Atl. 73 (murder; the trial judge told the jury that a question was whether there was a motive, in particular, whether the deceased had any money; the defendant's mother, with whom the deceased lived, had said on the direct examination that the deceased showed no large sums of money, and on the cross-examination, that he had no money but a dollar a week; she was then allowed to be contradicted by B, who testified that she had elsewhere said the deceased had $800; this statement, however, it was ruled, not being precisely inconsistent with her direct examination, and not being available to impeach the cross-examination where she had been made the examiner's own witness, was therefor inadmissible, and hence there was no evidence to show that he had money, except this contradiction; "for that reason alone, the judgment in my opinion should be reversed and a new trial granted"). This ruling apparently led to another statute, which makes a further effort to control the judicial mania (St. 1898, c. 237, § 136) by adding that "no judgment shall be reversed * * * for any error except such as shall or may have prejudiced the defendant in maintaining his defence upon the merits").

[2] Ky. Cr. C. 1877, § 340 ("A judgment of conviction shall be reversed for any error of law to the defendant's prejudice appearing on the record"); St. 1880, Mar. 4 (amended by adding: "whenever upon the consideration of the whole case the Court is satisfied that the substantial rights of the defendant have been prejudiced thereby"); 1880, Rutherford *v.* Com., 78 Ky. 639, 643 (dealing with the trial Court's erroneous refusal to allow the defendant to be present at a view; "If all the evidence that the jury could have received on the view * * * had been excluded, it is clear that the verdict must have been 'guilty of murder'; under such circumstances, we are authorized in saying that the record affirmatively shows that the error complained of was not 'prejudicial' to the defendant.").

among the marks of regeneration there must surely be found two vital ones.

First, the judge must cease to be merely an umpire at the game of litigation. To-day he is little more. This, to be sure, is in part, the continuance of a tradition, inherited from the spirit of gentlemanly sportsmanship which dominated the administration of British justice. But it has been intensified, instead of lessened, by the spirit of strenuous struggle and unrestrained persistence which drives the bar of our country to wage their contests to the extreme of technicality. The judge weakly resigns himself to the position of "a mere automaton, or at most the attitude of the presiding officer of a deliberative assembly, with no greater powers than those of announcing the utterances or conclusions of others."[1] To this many circumstances conspire. But it is an old and a marked tendency among us; and, until it is rooted out, that early warning of one of the Nestors of our judiciary will still be worth heeding:

1852, Nisbet, J., in Cook *v.* State, 11 Ga. 53, 57: "It is to be feared, in these days of reform, that the Judges will be so strictly laced, as to lose all power of vigorous and heathful action. I have but little fear of judicial power in Georgia so aggrandizing itself, as to endanger any of the powers of other departments of the government; or to endanger the life and liberty of the citizen; or to deprive the Jury of their appropriate functions. The danger rather to be dreaded is making the Judges men of straw, and thus stripping the Courts of popular reverence, and annihilating the popular estimate of the power and sanctity of the law."[2]

Secondly, the maudlin sentimentality of judges in criminal cases must cease. Reverence for the Constitution is one thing, and a respect for substantial fairness of procedure is commendable; but the exaltation of technicalities of every sort merely because they are raised on behalf of an accused person is a different and a reprehensible thing.

[1] 1885, Poché, J., in State *v.* Ford, 37 La. An. 443, 461.

[2] The following case illustrates the way in which this has been brought about partly by the unlicensed efforts of the bar: 1897, Davis *v.* State, 51 Neb. 301, 70 N. W. 984 (the trial judge's instruction was: "If the jury find from the evidence that all the incriminating circumstances * * * [leave a reasonable doubt], then you should by your verdict acquit him"; the phrase "incriminating circumstances" was objected to by the defence as unfair; but the Supreme Court rejected this claim in the following language: "It never was the intention of the law that the district judges of the state should abdicate their reason because a man was on trial charged with the commission of a crime; nor does the law of the land place the district judges in a straight jacket in criminal trials, nor make of them mere machines to repeat certain general propositions of law in their instructions." What was needed, however, was a stern rebuke, which should fittingly condemn the unscrupulous callousness of counsel capable of obstructing the course of justice by such impudent quibbles.

There seems to be a constant neglect of the pitiful cause of the injured victim, and the solid claims of law and order. All the sentiment is thrown to weight the scales for the criminal—that is, not for the mere accused, who may be assumed innocent, but for the man who upon the record plainly appears to be the villain that the jury have pronounced him to be. We have long since passed the period (as a modern judge has pointed out)[1] "when it is possible to punish an innocent man; we are now struggling with the problem whether it is any longer possible to punish the guilty." The dignity, the truth, and the lofty inspiration of great constitutional principles are frittered away and degraded. While on the one hand certain fundamental ideals of political liberty have come to be lightly questioned as impracticable or cynically ignored as obsolete, on the other hand the constitutional safeguards of procedure and evidence are invoked with such fatuous frequency and such misplaced technicality that their respect is lowered and their true purposes are defeated. "I do not understand," protested a great judicial interpreter of the organic law,[2] "that the Constitution is an instrument to play fast and loose with in criminal cases, any more than in any other; or that it is the business of Courts to be astute in the discovery of technical difficulties in the punishment of parties for their criminal conduct." Yet they seem to make it their business. A false sentiment misapplies their energies. This they must unlearn. The epoch of governmental oppression has passed away; the epoch of individualistic anarchy has taken its place. They must learn the lesson of transferring the emphasis of their sympathies,—a lesson more than once read to them by the voices of their own fellow-members of the judiciary:

1805, Smith, B., on the trial of Mr. Justice Johnson, in 29 How. St. Tr. 353: "There may indeed be a tame and creeping and tradesmanlike mode of administering the law conceived; but it is not one which meets my ideas of the duties or station of a judge. Laws are but means; and though it be not our province to legislate but to interpret, yet we should not forget or fail to further the end and object of those laws which we are called upon to construe, namely, the preservation of public morals, the

[1] 1893, Freeman, J., in Roper *v.* Territory, 7 N. Mex. 272.

[2] 1883, Cooley, J., in People *v.* Murray, 52 Mich. 291.

promotion of social order, and the establishment of good government, of our liberties, and of the constitution.

1873, McCoy, J., in Eberhart *v.* State, 47 Ga. 598, 610: "We have, however, no sympathy with that sickly sentimentality that springs into action whenever a criminal is at length about to suffer for crime. It may be a sign of a tender heart but it is also a sign of one not under proper regulation. Society demands that crime shall be punished and criminals warned, and the false humanity that starts and shudders when the axe of justice is ready to strike is a dangerous element for the peace of society. We have had too much of this mercy. It is not true mercy. It only looks to the criminal. But we must insist upon mercy to society, upon justice to the poor woman whose blood cries out against her murderers. That criminals go unpunished is a disgrace to our civilization; and we have reaped the fruits of it in the frequency with which bloody deeds occur."

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